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In the Supreme Court of the United States

October Term, 1961

[redacted] ET AL., COTTON STATES,
[redacted], PETITIONERS

[redacted] COMMISSION

PETITION AND BRIEF OF PETITIONERS TO THE
[redacted] COURT OF APPEALS FOR THE
[redacted] CIRCUIT

[redacted] COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 114

MID-SOUTH DISTRIBUTORS, ET AL., COTTON STATES, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a-14a) is reported at 287 F. 2d 512.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1961 (Pet. 15a). The petition for a writ of certiorari was filed on May 24, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the finding of the Federal Trade Commission that petitioners had knowingly received unlawful discriminatory prices from their suppliers in violation of Section 2(f) of the Clayton Act was supported by the evidence.

STATUTES INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, provides in part:

> (a) That it shall be unlawful for any person engaged in commerce * * * to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered; * * *
>
> (b) * * * *ovided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price * * * was made in good faith to meet an equally low price of a competitor * * *.
>
> * * * *

> (f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Section 4 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13b, provides:

> Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

STATEMENT

Petitioners Mid-South Distributors and Cotton States, Inc., act as buying agents for the 23 jobber petitioners who are engaged in selling automotive parts and supplies to wholesalers. Orders are sent in by member jobbers to the manufacturer on a Cotton States or Mid-South order form and the goods are shipped directly to the jobber by the manufacturer (R. 135-136). One copy of the order is forwarded by the jobber to the office of the cooperative (R. 139) which maintains a small staff and minimal warehousing facilities. Settlement of the aggregate purchases is made monthly by the cooperative (R. 149), which then bills each member jobber for its individual purchases (R. 147). The combined purchases in the name of the cooperative enable it to

qualify for maximum quantity discounts offered by the manufacturers. These discounts are based on annual purchases and generally reach a maximum of 20 percent for purchases of large amounts of goods. (See, *e.g.*, Comm. Exs. 10 and 52.) When the cooperatives receive these rebates, they are divided periodically among the member jobbers in proportion to their contribution to the total purchases which enabled the cooperative to qualify for the discount (R. 150).

The Commission on May 1, 1950, filed a complaint charging that the respondents in receiving these quantity discounts had knowingly accepted discriminatory prices prohibited by Section 2 of the Clayton Act, 15 U.S.C. 13 (R. 54-75). After full hearing, the examiner issued an Initial Decision finding the charges against the petitioners to have been sustained in every particular and ordering the jobber petitioners to cease and desist from securing, or utilizing the petitioner buying organizations as a means of securing discriminatory rebates from the parts manufacturers (R. 90-119). On appeal, the Commission adopted the examiner's findings, conclusions and order as its own (R. 119-120). Its opinion (R. 120-127; Pet. 16a-21a) concludes that the buying groups were merely bookkeeping devices and that there was nothing in the manner of operation which could result in any savings to the seller which could conceivably justify the large price discrimination between the members of the buying groups and other independent jobbers purchasing in virtually the same manner and in similar quantities. The inevitable result, the Com-

mission held, was the receipt of systematic price discriminations (Pet. 19a). The Commission further held that counsel in support of the complaint had sustained the evidentiary burden imposed by the case of *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, of showing that the petitioners knew or should have known that the seller's conduct was an unlawful price discrimination and not within one of the exculpatory provisions of Section 2 of the Clayton Act (Pet. 20a). The court of appeals affirmed (Pet. 1a-14a).

ARGUMENT

It is established that the giving of quantity discounts by automotive parts manufacturers to cooperative buying organizations of the type involved here violates Section 2(a) of the Clayton Act, 15 U.S.C. 13(a). See, *e.g.*, *Standard Motor Products* v. *Federal Trade Commission*, 265 F. 2d 674 (C.A. 2), certiorari denied, 361 U.S. 826; *P. & D. Mfg. Co.* v. *Federal Trade Commission*, 245 F. 2d 281 (C.A. 7), certiorari denied, 355 U.S. 884; *Moog Industries* v. *Federal Trade Commission*, 238 F. 2d 43 (C.A. 8), affirmed, 355 U.S. 411. This is the second case to have reached this Court involving the converse situation—the liability under Section 2(f) of the Clayton Act of the cooperative buying organizations and their constituent members for knowingly receiving the discriminatory prices. See *American Motor Specialties Co.* v. *Federal Trade Commission*, 278 F. 2d 225 (C.A. 2), certiorari denied, 364 U.S. 884. The present petition raises only the question whether the

Commission met the burden of demonstrating the knowledge necessary to support a finding of violation of Section 2(f) of the Clayton Act. Cf. *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61. This type of question, which the Court previously declined to review in *American Motor Specialties*, *supra*, is primarily factual and does not warrant certiorari. Nor is there any conflict between the circuits as to the standards upon which questions of this type should be adjudicated by the Commission.

1. Petitioners argue that the Commission failed to sustain its burden of showing that they were aware that the price discriminations they received would have the requisite adverse effect upon competition. But, as the Commission (R. 101) and the court of appeals (Pet. 7a-8a) both pointed out, petitioners were fully aware that they were securing by their actions a substantial price advantage over competing jobbers purchasing similar quantities of goods from the manufacturers, and that this advantage hurt their competitors and injured their ability to compete on equal terms. Knowledge that a buyer's competitors will be injured by a price discrimination "in itself is sufficient" to support a conclusion that the recipients of the discrimination knew or should have known that it "may" have the requisite adverse effect upon competition since, as this Court has stated, it is "self evident * * * that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially

cheaper than they sell like goods to the competitors of these customers". *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 50. See also *Corn Products Co.* v. *Federal Trade Commission*, 324 U.S. 726; *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 62-64.

2. Petitioners' claim that they were not shown to have had knowledge of the lack of cost justification for the rebates is equally lacking in merit. As the court of appeals, in affirming the findings and conclusions of the Commission on this point (R. 101-113), aptly summarized (Pet. 10a-11a):

> [The] volume discount rebates * * * were extended by Suppliers to induce greater purchases and not because the narrow price differential in each minutely graduated price tier represented any real difference or savings in costs. * * * The presentation to Suppliers by the Co-ops in seeking a discount arrangement was primarily one emphasizing volume only. The effort was not to convince a prospective Supplier that through the group purchases of the Co-op, economies would be effected. What was sought, and all that was sought, was parity with others who bought a like quantity. This was quite without regard to whether there were or were not savings.

Petitioners point to evidence that the sellers repeatedly assured them in general terms that the volume discounts could be cost justified. The Commission considered this evidence but found it "must be rejected" (R. 113) in view of petitioners' experience in the highly competitive automobile parts mar-

ket and their knowledge that no difference in the cost of manufacture, sale or delivery was involved as a result of their establishment of the cooperative buying organization (R. 113). The court of appeals, pointing to the fact that the "vague" sellers' statements were "repeated parrot-like for a succession of companies indiscriminately including many who extended no volume discounts and from whom individual jobbers could buy cheaper than through the Co-ops" (Pet. 12a), expressly affirmed the Commission's rejection of this testimony. This is exactly the situation envisioned by this Court in *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 80-81, n. 24, where it indicated that:

> * * * the Commission may in some circumstances wish to refuse to accept a buyer's claim that he relied on an affidavit or other assurance from the seller that price differentials were cost-justified; the furnishing of such an assurance might, together with other circumstances, indicate a sufficient absence of arm's-length bargaining to raise serious doubts as to the weight the assurance should be given in support of a buyer's claim.

3. Petitioners' other arguments relating to their alleged lack of knowledge of the non-availability of the Section 2(b) "meeting competition" defense, and of the fact they did not come within the statutory exemption for cooperatives set forth in Section 4 of the Robinson-Patman Act, require little discussion. As to the meeting-competition defense, it is enough to state that the cooperatives were not creatures of the manufacturers set up in order to enable the manu-

facturers to compete more effectively among themselves. Rather, the respondent cooperatives were originated by the respondent jobbers as a way of obtaining the maximum advantage from a volume discount system already in effect. The petitioners' contention regarding lack of knowledge of the adequacy of the statutory exemption for cooperatives as a defense is foreclosed by the language of the statute itself. Section 4 of the Robinson-Patman Act exempts only the distribution of profits by a cooperative to its members and does not presume to authorize discriminatory practices forbidden by other sections of the Act solely because they were carried out by a cooperative. *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. 2d 393 (C.A. 1); *American Motor Specialties Co., Inc.* v. *Federal Trade Commission*, 278 F. 2d 225 (C.A. 2), certiorari denied, 364 U.S. 884. In any event, the burden of showing that a person or practice falls within the exemption provisions of Section 4 is not upon the Commission; the "knowingly" language of Section 2(f) of the Clayton Act, upon which the rule of the *Automatic Canteen* case, *supra*, rests, refers only to the prohibitions of "this section"—*i.e.*, Section 2 of the Clayton Act, as amended, and Section 4 of the Robinson-Patman Act is not part of that "section". Cf. *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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